Supreme Court, U.S.
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No.

In the Supreme Court of the United States

Michael J. Landi,

Petitioner,

v.

R. Q. Hickman, Warden,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does rigid application of AEDPA's limitation period, so as to foreclose consideration of the merits of a habeas petitioner's first federal petition, violate the fundamental constitutional right of access to the courts?

2. Under what circumstances, if any, should an attorney's abandonment of a habeas petitioner, which results in the untimely filing of the petitioner's first federal petition, provide a basis for equitable tolling?

LIST OF PARTIES

Michael J. Landi (hereinafter "Landi") is the petitioner.

R. Q. Hickman, former warden of the Mule Creek State Prison in California, is the respondent.

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OPINIONS BELOW

The original opinion of the district court granting respondent's motion to dismiss in *Landi v. Hickman*, C-99-4301 SBA, is unreported. (App., *infra*, 1a-9a.) The order of the district court denying Landi's motion for reconsideration is unreported. (App., *infra*, 10a-16a.) The order of the district court granting Landi's application for a certificate of appealability is unreported. (App., *infra*, 17a-22a.)

The original opinion of the Court of Appeals for the Ninth Circuit in *Landi v. Hickman*, 01-15730, is unpublished, but is reported at 32 Fed. Appx. 383. (App., *infra*, 23a-26a.) The order of the court of appeals denying Landi's petition for rehearing and suggestion for rehearing en banc is unreported. (App., *infra*, 27a.)

JURISDICTION

The judgment of the court of appeals was entered on March 20, 2002. (App., *infra*, 23a-26a.) A timely petition for rehearing was denied on July 31, 2002. (App., *infra*, 27a.)

On October 21, 2002, JUSTICE O'CONNOR extended the time for filing this petition for writ of certiorari to and including November 28, 2002.

The jurisdiction of this Court is invoked under 28 U.S.C. §§ 1254(1), 1651(a), 2241(a), and 2254(a).

PRINCIPAL CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Suspension Clause of the Constitution provides: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. Const., art. I, § 9, cl. 2.

The Privileges and Immunities Clause of Article IV of the Constitution provides: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. Const., art. IV, § 2.

The Petition Clause of Article IV of the First Amendment provides: "Congress shall make no law ... abridging the ... right of the people ... to petition the Government for redress of grievances." U.S. Const., amend. I.

The Due Process Clause of the Fifth Amendment provides that "[n]o person shall be ... deprived of ... liberty ... without due process of law." U.S. Const., amend. V.

The Due Process Clause of the Fourteenth Amendment provides, that "[n]o State shall ... deprive any person of ... liberty ... without due process of law." U.S. Const., amend. XIV, § 1.

The Equal Protection Clause of the Fourteenth Amendment provides that "[n]o State shall ... deny to any person within its jurisdiction the equal protection of the laws." U.S. Const., amend. XIV, § 1.

28 U.S.C. § 2244(d)(1) provides: "A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court."

STATEMENT OF THE CASE

A. The Basis for Federal Jurisdiction in the Court of First Instance

The jurisdiction of the district court in proceedings below was invoked under 28 U.S.C. §§ 2241(a) and 2254(a).

B. Landi's Conviction and Sentence in State Court

On September 7, 1995, Landi received a sentence of imprisonment of 45 years to life after being convicted of sex offenses in the Santa Clara County Superior Court in California. (C.A. Supp. App.[1] 61, 86, 249.)

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[1] "C.A. Supp. App." refers to the supplemental appendix which was assembled by the Attorney General of the State of California during proceedings below in the Court of Appeals for the Ninth Circuit. The Attorney General denominated said appendix "supplemental excerpts of record."

C. Direct Review

Landi appealed the judgement of the superior court to the California Court of Appeal, Sixth Appellate District. In an unpublished opinion filed on November 20, 1996, the appellate court affirmed the superior court's judgment. (C.A. Supp. App. 86-98.)

On February 26, 1997, the California Supreme Court summarily denied Landi's petition for discretionary review. (C.A. Supp. App. 1, 249.)

D. Collateral Review in State Court[2]

On September 9, 1997, Landi's family and friends retained an attorney, Richard Dangler (hereinafter "Dangler"), to represent Landi in collaterally challenging his conviction and sentence. (C.A. Supp. App. 236-237, 264.)

Dangler recommended to Landi that they initiate the collateral challenge in state court. And, on November 26, 1997, Dangler sent Landi a "draft" of the habeas petition which Dangler was preparing to file in state superior court on Landi's behalf. (C.A. Supp. App.

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[2] In the factual recitation that follows, Landi recounts not only the court filings and rulings during the course of collateral review in state court, but also the correspondence between Landi and his habeas counsel which is material to consideration of the questions presented in this petition for writ of certiorari. See Rule 14(g) of the Rules of the Supreme Court of the United States.

264, 267.) Landi approved the draft and requested Dangler to file the petition. (C.A. Supp. App. 264-265.)

During December of 1997 and January of 1998, Landi and Dangler corresponded regarding the possibility of eventually petitioning for habeas relief in federal court in the event their state collateral challenge proved unsuccessful. In their correspondence, they discussed the time limitation which they believed, under AEDPA, would be applicable to any federal petition in Landi's case. In the course of this correspondence, Landi expressed concern regarding the time limitation, and Dangler assured Landi that he was "keenly aware" of and would comply with the "deadline." Dangler also advised Landi in this correspondence that the "deadline for [Landi's] *state* writ of habeas corpus" was February 26, 1998. (C.A. Supp. App. 237, 245, italics added.)[3]

On February 25, 1998, Dangler filed a habeas petition on Landi's behalf in the Santa Clara County Superior Court. (C.A. Supp. App. 249.)[4] The petition

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[3] There is no specific time limit for the filing of habeas petitions in California. The State's "timeliness rule is indeterminate." *Carey v. Saffold*, ___U.S.___, 153 L.Ed.2d 260, 269, 122 S.Ct. 2134, 2139 (2002).

[4] Dangler, whose law office is located in Sacramento, California, had mailed the petition on February 23, 1998, via Federal Express, to the Santa Clara County Superior Court in San Jose, California. (C.A. Supp. App. 268.)

contained claims for relief different from those that had been raised on Landi's behalf during the course of direct review. (C.A. Supp. App. 53-99, 211-212.) On March 27, 1998, the superior court denied the petition, concluding that Landi had not established "a prima facie case for relief." (C.A. Supp. App. 211-214, 249.)

On July 1, 1998, Dangler filed a renewed habeas petition on Landi's behalf in the California Court of Appeal, Sixth Appellate District.[5] On July 22, 1998, the appellate court summarily denied the petition. (C.A. Supp. App. 226.)

On October 8, 1998, Landi sent a letter to Dangler, expressing Landi's concern regarding the limitation period applicable to his case under AEPDA, and imploring Dangler to proceed quickly on his behalf. In this letter Landi also noted that it was his understanding that the California Court of Appeal had denied the petition filed in that court, but that, despite his repeated requests, Dangler had not sent Landi a copy of that court's ruling. (C.A. Supp. App. 248.)

On November 3, 1998, Dangler filed a renewed habeas petition on Landi's behalf in the California Supreme Court. (C.A. Supp. App. 2-46.) On March 31,

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[5] See *Carey v. Saffold*, 153 L.Ed.2d, at 268-269, 122 S.Ct., at 2139 ("California's collateral review system differs from that of other States in that it does not require, technically speaking, appellate review of a lower court determination. Instead it contemplates that a prisoner will file a new 'original' habeas petition.")

1999, the California Supreme Court summarily denied the petition. (C.A. Supp. App. 230.) Under California law, that order became final 30 days later, on April 30, 1999.[6]

On April 4, 1999, Landi received written notification from Dangler concerning the California Supreme Court's ruling. Landi then made a number of unsuccessful attempts to contact Dangler--requesting Dangler to file a federal petition on his behalf. On May 5, 1999, after receiving no response, Landi sent word to Dangler's office, demanding that Dangler return to Landi all of Landi's case file materials and trial transcripts. Despite repeated efforts to contact Dangler thereafter, Landi received no response until August of 1999. (C.A. Supp. App. 237-238, 265.)[7]

As calculated by the State Attorney General in briefing below in the Ninth Circuit, the AEDPA limitation period in Landi's case, accounting for statutory tolling,[8]

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[6] See *Bunney v. Mitchell*, 262 F.3d 973, 974 (CA9 2001) (*per curiam*) (noting that, under Rule 24 of the California Rules of Court, a "'decision of the [California] Supreme Court becomes final 30 days after filing '").

[7] Rule 3-700(D)(1) of the Rules of Professional Conduct of the State Bar of California provides, in pertinent part: An attorney whose representation has been terminated shall "promptly release to the client, at the request of the client, all the client papers and property."

[8] See 28 U.S.C. § 2244(d)(2).

expired on July 30, 1999.) (Appellee's Brief in case no. 01-15730, at 5.)

On August 11, 1999, Dangler sent a letter to Landi, informing Landi that he was returning "all of the legal records and files" that Landi had furnished to Dangler when he had been retained back in September of 1997. (C.A. Supp. App. 269.) Landi received these materials on August 15, 1999--over two weeks after the expiration of the federal limitation period, as calculated by the State Attorney General. (C.A. Supp. App. 237-238, 265.)

E. Collateral Review in Federal Court

On September 21, 1999, Landi filed a pro se habeas petition pursuant to 28 U.S.C. § 2254 in the United States District Court, Northern District of California. (C.A. Supp. App. 231-232, 270, 275.) As the district court noted, the petition had been signed by Landi on September 1, 1999. (C.A. Supp. App. 251.)[9]

The California State Attorney General moved to dismiss Landi's petition as untimely under 28 U.S.C. § 2244(d). And, on May 3, 2000, the district court granted the motion to dismiss. (C.A. Supp. App. 249-

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[9] "Under the 'prison mailbox rule' of *Houston v. Lack*, 487 U.S. 266, 101 L.Ed.2d 245, 108 S.Ct. 2379 (1988), a prisoner's federal habeas petition is deemed filed when he hands it over to prison authorities for mailing to the district court." *Huizar v. Carey*, 273 F.3d 1220, 1222 (CA9 2001).

254.)

On September 27, 2000, the district court denied Landi's motion for reconsideration of the order of dismissal. (C.A. Supp. App. 270-273.)

Landi filed a notice of appeal in the district court. On April 10, 2001, the district court granted Landi's application for a certificate of appealability. (C.A. Supp. App. 232-235.)

On March 20, 2002, the Court of Appeals for the Ninth Circuit filed an opinion concluding that Landi's case does not present extraordinary circumstances that warrant equitable tolling of the AEPDA limitation period, and affirmed the district court's judgment on that basis. (App., *infra*, 15a-16a.)

On July 31, 2002, the court of appeals denied Landi's petition for rehearing and rehearing en banc. (App., *infra*, 17a.)

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

This case raises unsettled issues of surpassing significance concerning the rights of state prisoners to gain meaningful access to the federal courts for purposes of seeking habeas corpus relief.

Resolution of these issues entails application of the provisions of the Constitution that bear upon the most basic right of habeas petitioners--to have their substantive claims for relief considered and ruled upon by the courts. Furthermore, resolution of these issues

involves an assessment of whether, and to what extent, the scope of the rights safeguarded by these constitutional provisions has been impacted by the Antiterrorism and Effective Death Peanlty Act ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214 (1996).

Specifically, this case involves issues concerning the extent to which a state prisoner's substantive habeas claims may be deemed forfeited due to the prisoner's counsel's abandonment of the prisoner.

The opinions of the lower federal courts touching upon the issues *sub judice* are in conflict. Not only are suostantially different criteria applied within the various federal circuits for assessing the propriety of equitably tolling habeas limitations periods due to attorney malfeasance and nonfeasance, but also several of the highest courts of the various States apply standards which are irreconcilable with those adopted by the federal courts in this context. Landi respectfully submits that, under this Court's Rule 10, these conflicts within our Nation's judiciary give rise to a compelling reason for granting certiorari in this case. See *Yee v. City of Escondido*, 503 U.S. 519, 538, 118 L.Ed.2d 153, 112 S.Ct. 1522 (1992).

The ensuing discussion will address {A} the extent to which the Constitution safeguards the rights of prisoners to seek meaningful habeas relief, {B} the limitation period established by AEDPA for the filing of federal habeas petitions by state prisoners, {C} general principles concerning equitable tolling, {D} the divergent authority in our Nation concerning the

availability of equitable tolling in cases involving attorney errors and omissions, and {E} the manner in which these principles and authorities apply to the instant case--an application which yields differing results depending upon which lines of authority are followed, thusly demonstrating the desirability and propriety herein of this Court's review on certiorari.

A. The Extent to which the Constitution Safeguards the Right of a Prisoner to Petition for Habeas Relief

Although prisoners have no right to the assistance of counsel in seeking habeas relief, they are free to retain counsel in seeking such relief. And, this Court's precedent demonstrates that habeas petitioners do have constitutionally protected interests at stake in their pursuit of habeas relief. Landi's effort to vindicate these constitutionally protected interests is the subject of this petition.

1. No Constitutional Right to Counsel in Habeas Proceedings

It is established that "[t]here is no constitutional right to an attorney in state post-conviction proceedings." *Coleman v. Thompson*, 501 U.S. 722, 752, 115 L.Ed.2d 640, 111 S.Ct. 2546 (1991). Likewise, there is no constitutional right to appointed counsel in federal habeas corpus. *McClesky v. Zant*, 499 U.S. 467,

495, 113 L.Ed.2d 517, 111 S.Ct. 1454 (1991) (citing *Pennsylvania v. Finley*, 481 U.S. 551, 555, 95 L.Ed.2d 539, 107 S.Ct. 1990 (1987)). Thus, " *[i]n the absence of a constitutional violation*, the petitioner bears the risk in federal habeas for all attorney errors made in the course of the representation...." *Coleman v. Thompson*, 501 U.S., at 754 (italics added) (citing *Murray v. Carrier*, 477 U.S. 478, 91 L.Ed.2d 397, 106 S.Ct. 2639 (1986)).

2. The Constitutional Privilege to Petition for Habeas Corpus Relief and the Constitutional Right of Access to the Courts

The availability of habeas corpus was "[c]onsidered by the Founders as the highest safeguard of liberty...." *Smith v. Bennett*, 365 U.S. 708, 712, 6 L.Ed.2d 39, 81 S.Ct. 895 (1961). Thus, as this Court has repeatedly stressed with regard to the federal writ of habeas corpus: "'there is no higher duty than to maintain it unimpaired.'" *Id.*, at 713 (quoting *Bowen v. Johnston*, 306 U.S. 19, 26, 83 L.Ed. 455, 59 S.Ct. 442 (1939)); see also *Ex Parte Lange*, 85 U.S. (18 Wall.) 163, 178, 21 L.Ed. 872 (1873).

"The writ of habeas corpus plays a vital role in protecting constitutional rights." *Slack v. McDaniel*, 529 U.S. 473, 483, 146 L.Ed.2d 542, 120 S.Ct. 1595 (2000). "Fundamental fairness is the central concern of the writ of habeas corpus." *Strickland v. Washington*, 466 U.S. 668, 697, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984).

"Since the basic purpose of the writ is to enable those unlawfully incarcerated to obtain their freedom, it is fundamental that access of prisoners to the courts for the purpose of presenting their complaints may not be denied or obstructed." *Johnson v. Avery*, 393 U.S. 483, 485, 21 L.Ed.2d 718, 89 S.Ct. 747 (1969); *Chessman v. Teets*, 354 U.S. 156, 165, 1 L.Ed.2d 1253, 77 S.Ct. 1127 (1957).[10]

There is authority to support the proposition that restrictions on a habeas petitioner's right to seek relief, such as certain applications of statutes of limitation, violate Art. I, § 9, cl. 2 of the Constitution--the Suspension Clause--if said restrictions "render[] the remedy of habeas corpus 'inadequate or ineffective.'" *Green v. White*, 223 F.3d 1001, 1003 (CA9 2000) (quoting *Swain v. Pressley*, 430 U.S. 372, 381, 51 L.Ed.2d 411, 97 S.Ct. 1224 (1977)). However, "[b]ecause the current writ is so different from the one known to the Framers, some jurists have questioned whether--

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[10] As this Court recently observed, "the basis of the constitutional right of access to courts " is not settled. *Christopher v. Harbury*, ___U.S.___, 153 L.Ed.2d 413, 424, 122 S.Ct. 2179, 2186 (2002). Indeed, the "[d]ecisions of this Court have grounded the right of access to court in the Article IV Privileges and Immunities Clause, [citations], the First Amendment Petition Clause, [citations], the Fifth Amendment Due Process Clause, [citations], and the Fourteenth Amendment Equal Protection, [citation], and Due Process Clauses, [citations]." *Id.*, 153 L.Ed.2d, at 424 n. 12, 122 S.Ct., at 2186 n. 12.

and to what extent--the Suspension Clause applies to the modern habeas remedy." *Delaney v. Matesanz*, 264 F.3d 7, 12 (CA1 2001) (citing *Freeman v. Page*, 208 F.3d 572, 576 (CA7), cert. denied, 531 U.S. 946, 148 L.Ed.2d 277, 121 S.Ct. 345 (2000)).[11]

B. AEDPA's Statute of Limitations

A one-year statute of limitations for state prisoners to file federal habeas petitions is set forth in 28 U.S.C. § 2244(d)(1), which Congress enacted with AEDPA. Under this limitation period, a state prisoner

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[11] In this regard, the "divergent views" of the Justices of this Court "about the sweep of the Suspension Clause" have been noted: See *Delaney v. Matesanz*, 264 F.3d, at 12 n. 1, citing *INS v. St. Cyr*, 533 U.S. 289, 305, 150 L.Ed.2d 347, 121 S.Ct. 2271 (2001) (opinion of JUSTICE STEVENS for the Court, joined by JUSTICES KENNEDY, SOUTER, GINSBURG, and BREYER, concluding "that a serious Suspension Clause issue would be presented" if Congressional enactments, including provisions of AEDPA, were interpreted as altogether withdrawing the power from federal judges to issues writs of habeas corpus in certain cases); *id.*, at 337 (dissenting opinion of JUSTICE SCALIA, joined by CHIEF JUSTICE REHNQUIST and JUSTICE THOMAS, concluding that the Suspension Clause does not affirmatively establish the existence of a right to petition for habeas relief, but merely sets forth the circumstances under which the privilege, once conferred by Congress, may be suspended); *id.*, at 326 (dissenting opinion of JUSTICE O'CONNOR, "assuming" without determining whether "the Suspension Clause guarantees some minimum extent of habeas review").

generally has one year from the date on which the prisoner's state court conviction becomes final--"by the conclusion of direct review or the expiration of the time for seeking such review"--to petition for federal habeas corpus relief. § 2244(d)(1)(A); *Carey v. Saffold*, 153 L.Ed.2d, at 266, 122 S.Ct., at 2136.

This one-year period of limitation is tolled during the pendency of properly filed state court applications for post-conviction relief. § 2244(d)(2). Also, every circuit court to have addressed subject has held that "the one-year limitation period under § 2255 (or § 2244) is a statute of limitations, subject to the doctrine of equitable tolling, rather than a jurisdictional requirement." *Dunlap v. United States*, 250 F.3d 1001, 1004 & n. 1 (CA6), cert. denied, 534 U.S. 1057 (2001).

"AEDPA's one-year statute of limitations is part of 'a complex and evolving body of equitable principles informed and controlled by historical usage, statutory developments, and judicial decisions.'" *Delaney v. Matesanz*, 264 F.3d at 13 (quoting *Felker v. Turpin*, 518 U.S. 651, 664, 135 L.Ed.2d 827, 116 S.Ct. 2333 (1996)).

C. Equitable Tolling Generally and in AEDPA Cases

"It is hornbook law that limitations periods are 'customarily subject to "equitable tolling[.]"'" *Young v. United States*, 535 U.S. 43, ___, 152 L.Ed.2d 79, 86, 122 S.Ct. 1036, 1040 (2002) (quoting *Irwin v. Department of*

Veterans Affairs, 498 U.S. 89, 95, 112 L.Ed.2d 435, 111 S.Ct. 453 (1990)). See also *Baldwin County Welcome Center v. Brown*, 466 U.S. 147, 151, 80 L.Ed.2d 196, 104 S.Ct. 1723 (1984) (*per curiam*); see also *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393, 71 L.Ed.2d 234, 102 S.Ct. 1127 (1982) ("a statute of limitations[] is subject to waiver, estoppel, and equitable tolling").

"Traditionally and for good reasons, statutes of limitation are not controlling measures of equitable relief. Such statutes have been drawn upon by equity solely for the light they may shed in determining ... whether the plaintiff has inexcusably slept on his rights." *Holmberg v. Armbrecht*, 327 U.S. 392, 396, 90 L.Ed. 743, 66 S.Ct. 582 (1946). Of course, "habeas corpus is, at its core, an equitable remedy." *Schlup v. Delo*, 513 U.S. 298, 319, 130 L.Ed.2d 808, 115 S.Ct. 851 (1995). "Equity eschews mechanical rules; it depends on flexibility." *Holmberg*, 327 U.S., at 396. Unless Congress explicitly states otherwise, "[t]his equitable doctrine is read into every federal statute." *Id.*, at 395–397. See also, *United States v. Locke*, 471 U.S. 84, 94 n. 10, 85 L.Ed.2d 64, 105 S.Ct. 1785 (1985); *Bailey v. Glover*, 88 U.S. (21 Wall.) 342, 347, 22 L.Ed. 636 (1874) (this Court's decision, in which the doctrine of equitable tolling is rooted); D. Taffee, *Tolling the Deadline for Appealing Absentia Deportation Orders Due to Ineffective Assistance of Counsel*, 68 U. Chi. L. Rev. 1065, 1068 (2001).

There is a "rebuttable presumption" that equitable tolling applies to congressionally created

statutes of limitation. *Irwin v. Department of Veterans Affairs*, 498 U.S., at 95–96. Thus, in addressing whether a given statute is subject to equitable tolling, courts should ask: "Is there good reason to believe Congress did *not* want the equitable tolling doctrine to apply?" *United States v. Brockamp*, 519 U.S. 347, 350, 136 L.Ed.2d 818, 117 S.Ct. 849 (1997) (italics in the original); *Burnett v. New York Central Railroad Co.*, 380 U.S. 424, 427, 13 L.Ed.2d 941, 85 S.Ct. 1050 (1965).

With regard to habeas proceedings, nothing in this Court's precedent, "nor anything in the text or legislative history of AEDPA, precludes a federal court from deeming [AEDPA's] limitations period tolled ... as a matter of equity...." *Duncan v. Walker*, 533 U.S. 167, 182, 150 L.Ed.2d 251, 121 S.Ct. 2120 (2001) (STEVENS, J., concurring in part and concurring in the judgment). In *Walker*, the majority of the Justices of this Court declined to address this point raised by JUSTICE STEVENS "concerning the availability of equitable tolling." *Id.*, at 181. However, JUSTICE SOUTER, in his concurring opinion, noted "that a claim for equitable tolling could present a serious issue" in an appropriate case. *Id.*, at 182. And, JUSTICE BREYER, joined in his dissenting opinion by JUSTICE GINSBURG, characterized as "sound" JUSTICE STEVENS' "suggestion[] that district courts ... employ equitable tolling" in appropriate cases. *Id.*, at 192. Expressing a similar view in a portion of her opinion in *Lackawanna County Dist. Attorney v. Cross*, 532 U.S. 394, 149 L.Ed.2d 608, 121 S.Ct. 1567 (2001), which was joined by CHIEF JUSTICE REHNQUIST

and JUSTICE KENNEDY, JUSTICE O'CONNOR stated: "It is not always the case ... that a defendant can be faulted for failing to obtain timely review of a constitutional claim." *Id.*, at 405. Thus, it appears that a majority of the Justices of this Court endorse the proposition that AEDPA's limitations period is subject to equitable tolling.

"[N]umerous lower courts" have also recognized the propriety of "equitable tolling of AEDPA's statute of limitations in situations in which strict application of the statute would produce ... unjust result[s]." R. Hertz and J. Liebman, 1 *Federal Habeas Corpus Practice and Procedure*, § 5.2a, p. 239 (4th ed. 2001). Indeed, as noted above, every circuit court to have addressed subject has held that "the one-year limitation period under § 2255 (or § 2244) is a statute of limitations, subject to the doctrine of equitable tolling...." *Dunlap v. United States*, 250 F.3d, at 1004 & n. 1.

D. Equitable Tolling in Cases Involving Attorney Abandonment

While this Court has addressed the propriety of applying equitable tolling generally, as outlined above, and in certain specific contexts, this Court has not addressed the subject in the specific context of habeas petitions which are untimely due to attorney abandonment and error.

This Court's decisions do establish a general rule that an attorney's errors in failing to timely assert legal rights will be attributed to the client. *United States v. Boyle*, 469 U.S. 241, 252, 83 L.Ed.2d 622, 105 S.Ct. 687 (1985) (holding that a client is not entitled to relief based upon reliance on counsel to timely file a tax return); *Link v. Wabash R. Co.*, 370 U.S. 626, 633-634, 8 L.Ed.2d 734, 82 S.Ct. 1386 (1962) ("Petitioner voluntarily chose this attorney as his representative in the actions, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent.").

However, in light of the constitutionally protected interests at stake in habeas cases, this general rule cannot be applied in a case such as the instant case so as to close the federal courthouse doors to a prisoner seeking to present his first federal petition, albeit untimely, when the untimeliness is attributable to the fact that the petitioner was abandoned by the attorney he hired. Such a result would be tantamount to suspension of the writ, and such a result could not be reconciled with the principle "that access of prisoners to the courts for the purpose of presenting their complaints may not be denied or obstructed." *Johnson v. Avery*, 393 U.S., at 485.

Notwithstanding the pertinence of these constitutional imperatives in cases such as the instant case, the relatively recent enactment of AEDPA has spawned a line of authority in the lower federal judiciary which seemingly seizes upon attorney ineptitude as a basis for precluding application of

equitable tolling without regard to any other circumstances. However, there is a contrary line of authority in the lower federal judiciary and in the state courts, which does not allow for such a mechanical jettisoning of equitable tolling in habeas cases that have been tainted by attorney blunders. In some instances, the divergence of these lines of authority appears to be attributable to the courts' application of different criteria with respect to assessing the propriety of equitable tolling. In other instances, however, the divergent cases are utterly irreconcilable.

1. Federal Habeas Cases Declining to Allow for Equitable Tolling in the Event of Garden Variety Attorney Neglect

There is an abundance of authority in the lower federal courts for the proposition that when mere negligence on the part of an attorney results in a habeas petitioner's claims not being presented within AEDPA's limitation period, the petitioner is not entitled to invoke equitable tolling so as to avoid the time bar. Exemplary of these cases is *Frye v. Hickman*, 273 F.3d 1144, 1146 (CA9 2001), cert. denied, ___U.S.___, 152 L.Ed.2d 823, 122 S.Ct. 1913 (2002). There, the court--after acknowledging that equitable tolling is available where the dereliction of a habeas petitioner's former counsel "ma[kes] it impossible" for successor counsel to timely file a petition--concluded without analysis

that "the miscalculation of the limitations period by [a petitioner's] counsel and [counsel's] negligence in general do not constitute ... extraordinary circumstance[s] to warrant equitable tolling."[12]

Regardless of whether these cases are rightly decided, and Landi believes they are not, these "garden variety" attorney neglect cases are distinguishable from the instant case, as the instant case involves an entirely different order of misconduct--attorney abandonment which precluded Landi from being able to timely file his first federal petition. But, beyond the particular circumstances of Landi's case, the conflict

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[12] See also *Smaldone v. Senkowski*, 273 F.3d 133, 138-139 (CA2 2001) (finding "attorney error inadequate to create the 'extraordinary' circumstances equitable tolling requires"), cert. denied, ___U.S.___, 152 L.Ed.2d 621, 122 S.Ct. 1606 (2002); *Kreutzer v. Bowersox*, 231 F.3d 460, 463 (CA8 2000) ("Counsel's confusion about the application statute of limitations does not warrant equitable tolling."), cert. denied *sub nom. Kreutzer v. Luebbers*, 534 U.S. 863, 151 L.Ed.2d 97, 122 S.Ct. 145 (2001); *Marsh v. Soares*, 223 F.3d 1217, 1220-1221 (CA10 2000), cert. denied, 531 U.S. 1194, 149 L.Ed.2d 110, 121 S.Ct. 1195 (2001); *Steed v. Head*, 219 F.3d 1298, 1300 (CA11 2000) ("An attorney's miscalculation of the limitations period or mistake is not a basis for equitable tolling."); *Harris v. Hutchinson*, 209 F.3d 325, 330-331 (CA4 2001); *Molo v. Johnson*, 207 F.3d 773, 775 n. 8 (CA5 2000); *Taliani v. Chrans*, 189 F.3d 597, 598 (CA7 1999); *Cummings v. Yukins*, 197 F.Supp.2d 785, 787 (E.D. Mich. 2002) ("Attorney error which results in the filing of an untimely petition is not a circumstance which justifies tolling the limitations period.").

between *Frye v. Hickman*, et al., and the line of decisions, discussed immediately below, reveals the propriety of this Court's involvement to resolve this important subject.

2. Federal Cases Allowing for Equitable Tolling Due to Attorney Dereliction

In *Baskin v. United States*, 998 F.Supp. 188 (D. Conn. 1998), the court held: "It would be grossly inequitable to bar [a] petitioner's ineffective assistance of counsel claim on the basis that counsel's error permitted the statute of limitations to run." Id., at 190.[13] This conclusion simply cannot be reconciled with the holding in *Frye v. Hickman*, 273 F.3d, at 1146.

Also, in a recent decision, a panel of the Ninth Circuit appears to have retreated somewhat from the hard-line position taken in *Frye*, holding:

> "Although routine instances of attorney negligence do not generally constitute 'extraordinary circumstances' entitling a habeas petitioner to equitable tolling, ...

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[13] See also *Barton v. United States Postal Service*, 612 F.Supp. 1057, 1059 (N.D. Ohio 1985) (applying equitable tolling so as to avoid time bar where plaintiff "pursued his claim as diligently as possible" but the claim was not timely filed because plaintiff's attorney "irresponsibly abandoned his client and the case and left town without informing his client").

> there are instances in which an attorney's failure to take necessary steps to protect his client's interests is so egregious and atypical that the court may deem equitable tolling appropriate."

Ford v. Hubbard, 305 F.3d 875, 890-891 (CA9 2002).

The Ninth Circuit has also recognized that lack of notice of the applicable limitations period, when not attributable to an absence of diligence, may provide a basis for equitable tolling. *Whalem/Hunt v. Early*, 233 F.3d 1146, 1148 (CA9 2000) (*en banc*) (concluding that district court erred by flat out rejecting the petitioner's argument that factors beyond his control prevented him from learning of the limitations period). Similarly, the Third Circuit has recognized that "serious" failings on the part of a habeas petitioner's attorney "may constitute extraordinary circumstances to justify equitable tolling." *Nara v. Frank*, 264 F.3d 310, 320 (CA3 2001).[14]

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[14] See also *Fahy v. Horn*, 240 F.3d 239, 244 (CA3 2001) (In a capital case, "we must allow less than 'extraordinary' circumstances to trigger equitable tolling of the AEDPA's statute of limitations when a petitioner has been diligent in asserting his claims or rigid application of the statute would be unfair."), cert. denied *sub nom. Horn v. Fahy*, 534 U.S. 944 (2002); *Erwin v. Elo*, 130 F.Supp.2d at 890 ("When a petitioner, through no fault of his own, first learns of the outcome of a final appeal after the time for seeking habeas has expired,

3. State Cases Allowing for Equitable Tolling Due to Attorney Error

In accord with the latter group of federal decisions discussed above are the decisions of the State Supreme Courts of Tennessee, Florida, and California.

The Tennessee Supreme Court has held that habeas limitation periods may be "tolled because of due process concerns surrounding possible attorney misrepresentation...." *Williams v. State*, 44 S.W.3d 464, 471 (2001).

Similarly, the Florida Supreme Court has held, as a matter of due process, that a habeas petitioner is entitled to file a belated petition when it is established 'that he or she missed the deadline ... because his or her attorney had agreed to file the [petition] but failed to do so in a timely manner." *Steele v. Kehoe*, 747 So.2d 931, 934 (1999).

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equitable tolling is appropriate."); *Plowden v. Romine*, 78 F.Supp.2d 115, 119 (E.D.N.Y. 1999); *Vasquez v. Greiner*, 68 F.Supp.2d 307, 310 (S.D.N.Y. 1999). There are also cases outside of the habeas context wherein the propriety of equitably tolling statutes due to attorney errors and omissions has been recognized. See *Seitzinger v. Reading Hosp. & Med. Ctr.*, 165 F.3d 236, 240 (CA3 1999) (noting that "some courts have found it appropriate to toll the statute of limitations in cases of attorney mistake"); *Cantrell v. Knoxville Community Dev. Corp.*, 60 F.3d 1177, 1180 (CA6 1995).

And, the California Supreme Court has held:

> "In limited circumstances, consideration may be given to a claim that prior habeas corpus counsel did not competently represent a petitioner. An imprisoned defendant is entitled by due process to reasonable access to the courts, and to the assistance of counsel if counsel is necessary to ensure that access....Regardless of whether a constitutional right to counsel exists, a petitioner who *is* represented by counsel when a petition for writ of habeas corpus is filed has a right to assume that counsel is competent and is presenting all potentially meritorious claims."

In re Clark, 5 Cal.4th 750, 779–780, 855 P.2d 729, 748, 21 Cal.Rptr.2d 509 (1993) (emphasis in the original); accord, *In re Sanders*, 21 Cal.4th 697, 719, 981 P.2d 1038, 1053, 87 Cal.Rptr.2d 899 (1999).

4. The Different Criteria Applied by the Courts to Assess the Propriety of Allowing for Equitable Tolling

In addition to the lack of uniformity amongst the courts concerning the availability of equitable tolling

based upon attorney errors and omissions, there is also a lack of uniformity in the courts concerning the standards and criteria to be applied in determining whether to equitably toll AEDPA in particular cases.

> "The test for equitable tolling under AEDPA varies among the circuits. Most circuits use the 'rare and exceptional circumstances' or 'extraordinary circumstances' test. [Citations.] The Sixth Circuit, however, considers five factors: (i) the petitioner's lack of notice of the filing requirement, (ii) the petitioner's lack of constructive knowledge of the filing requirement, (iii) diligence in pursuing one's rights, (iv) absence of prejudice to the respondent, and (v) the petitioner's reasonableness in remaining ignorant of the legal requirement for filing his claim."

McGuinness v. Pepe, 150 F.Supp.2d 227, 234 n. 15 (D. Mass. 2001)[15]

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[15] The five-factor test employed by the Sixth Circuit was initially set out in *Andrews v. Orr*, 851 F.2d 146 (CA6 1988). The test has been regularly applied by the Sixth Circuit in AEDPA cases. *Cobas v. Burgess*, 306 F.3d 441, 444 (CA6 2002); *Dunlap v. United States*, 250 F.3d 1001, 1008-1009 (CA6), cert. denied, 534 U.S. 1057 (2001).

"The First Circuit has not addressed equitable tolling in the context of AEDPA, but its test for equitable tolling in general has been somewhere between the 'exceptional circumstances' test and the five-factor test." *Id.* (citing *Jobe v. INS*, 238 F.3d 96, 100 (CA1 2001) (*en banc*) (applying the five-factor test); *Bonilla v. Muebles J. J. Alvarez, Inc.*, 194 F.3d 275, 279 (CA1 1999) (applying the "exceptional circumstances" test)).

E. Analysis and Conclusion

AEDPA "was enacted, in relevant part, to curb the abuse of the writ of habeas corpus." *Miller v. New Jersey State Dep't of Corrections*, 145 F.3d 616, 618 (CA3 1998), citing H.R. Conf. Rep. No. 104-518, at 111 (1996), reprinted in 1996 U.S.C.C.A.N. 944.[16]

There has been no abuse of the writ by Landi in the instant case. To the contrary, promptly after the conclusion of direct review of Landi's state court

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[16] The House Report on AEDPA provides: "The bill is designed to reduce the abuse of habeas corpus that results from delayed and repetitive filings.... To help accomplish [this] purpose, the bill imposes periods of limitation on federal habeas corpus petitions filed under 28 U.S.C. section 2254.... This reform will curb the lengthy delays in filing that now often occur in federal habeas corpus litigation, while preserving the availability of review when a prisoner diligently pursues state remedies and applies for federal habeas review in a timely manner." H.R. Rep. No. 104-23, at 29.

conviction and sentence, Landi retained an attorney, Richard Dangler, to represent him in collaterally challenging the state court judgment. During the process of collateral review in state court, Landi displayed diligence by regularly corresponding with his attorney about the status of his case and the applicable legal principles.

Problems began to arise during the state collateral proceedings when Dangler delayed inexplicably in filing Landi's initial state habeas petition. Indeed, by Dangler's calculations, Dangler did not file that petition until one day before the expiration of the AEDPA limitation period applicable to Landi's case--thereby tolling the AEDPA limitation period, but leaving what Dangler must have perceived to be no realistic opportunity for Landi to file a petition in federal court at the conclusion of the habeas proceedings in state court. Indeed, as noted in the Statement of the Case, *ante*, Dangler believed the "deadline" in Landi's case was February 26, 1998. (C.A. Supp. App. 237, 245.) However, he did not file Landi's initial state petition until February 25, 1998. (C.A. Supp. App. 249.)

In light of the foregoing, it is not surprising that Dangler abandoned Landi after the state habeas proceedings concluded. He failed to respond to any of Landi's efforts to contact him. And, in derogation of California's Professional Conduct Rules, he held on to Landi's transcripts and file materials for months, despite Landi's repeated requests for the materials.

Thus, Dangler's dilatory conduct at the outset of his representation of Landi, together with his abandonment of Landi and his unjustified retention of Landi's legal materials, precluded Landi from filing his first federal petition on time. These circumstances cry out for application of the equitable tolling doctrine.

"Dismissal of a first habeas petition is a particularly serious matter, for that dismissal denies the petitioner the protections of the Great Writ entirely, risking injury to an important interest in human liberty." *Lonchar v. Thomas*, 517 U.S. 314, 324, 134 L.Ed.2d 440, 116 S.Ct. 1293 (1996).

Perhaps, under a mechanical application of the "extraordinary circumstance" or "exceptional circumstance" tests employed by the majority of the circuit courts, Dangler's abdication of his responsibilities to Landi could be treated as routine or "garden variety" nonfeasance and/or malfeasance. But, hopefully not. Slovenly and unethical conduct on the part of an attorney should not be brushed aside so lightly.

The conflicting authorities discussed above demonstrate that the entitlement to equitable relief of a prisoner like Landi, who has been neglected and abandoned by his attorney, will likely depend on the particular venue in which such relief is sought. Such incongruity and disparity has no place in the law. Accordingly, Landi seeks this Court's review on certiorari.

CONCLUSION

Based upon the foregoing authorities and analysis, Landi respectfully requests this Court to grant this petition for writ of certiorari.

DATE: January 8, 2003

Respectfully Submitted,

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APPENDICES

A. District Court Order Granting Motion to Dismiss 1a

B. District Court Order Denying Motion for Reconsideration 10a

C. Certificate of Appealability 17a

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E. Ninth Circuit Denial of Rehearing En Banc 27a

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

MICHAEL JERRY LANDI,	)	
	)	No. C 99-4301 SBA
Petitioner,	)	
	)	ORDER GRANTING
v.	)	MOTION TO DISMISS
	)	
R.Q. HICKMAN, Warden,	)	
	)	
Respondent.	)	
	)	

Petitioner, a California prisoner incarcerated at Mule Creek State Prison, filed this pro se habeas corpus petition pursuant to 28 U.S.C. § 2254 and was granted leave to proceed in forma pauperis. (Docket No. 9). Petitioner has filed an opposition, in which he argues that the limitations period under § 2244(d) should be equitably tolled. (Docket Nos. 15, 16). Petitioner also requests reconsideration of the Court's decision not to appoint counsel. (Docket Nos. 17, 18).

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BACKGROUND

Petitioner pled no contest to three counts of aggravated child molestation on August 7, 1995 and was sentenced to 45 years to life in prison. Petitioner appealed to the California Court of Appeal, which affirmed in 1996. The California Supreme Court denied a petition for review on February 26, 1997.

Petitioner retained new counsel and filed a habeas corpus petition in the Santa Clara Superior Court on February 25, 1998. The court denied the petition on March 27, 1998. Petitioner next filed a writ of habeas corpus in the California Court of Appeal, which was denied on July 22, 1998. He then filed a petition for writ of habeas corpus with the California Supreme Court on November 3, 1998, which the Court denied on March 31, 1999. The federal petition now before the Court is dated September 1, 1999 and was filed on September 21, 1999.

DISCUSSION

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), which became law on April 24, 1996, imposed for the first time a statute of limitations on petitions for a writ of habeas corpus filed by state prisoners. Petitions filed by prisoners challenging non-capital state convictions or sentences must be filed within one year of the latest of the date on which: (1) the judgment became final after the conclusion of direct review or the time

passed for seeking direct review; (2) an impediment to filing an application created by unconstitutional state action was removed, if such action prevented petitioner from filing; (3) the constitutional right asserted was recognized by the Supreme Court, if the right was newly recognized by the Supreme Court and made retroactive to cases on collateral review; or (4) the factual predicate of the claim could have been discovered through the exercise of due diligence. 28 U.S.C. § 2244(d)(1).

1. Filing Deadline

The one-year period generally will run from "the date on which the judgment became final by conclusion of direct review or the expiration of the time for seeking such review." 28 U.S.C. § 2244(d)(1)(A). "Direct review" includes the period within which a petitioner can file a petition for a writ of certiorari from the United States Supreme Court, whether or not the petitioner actually files such a petition. See Bowen v. Roe, 188 F.3d 1157, 1159 (9th Cir. 1999). Accordingly, if a petitioner fails to seek a writ of certiorari from the United States Supreme Court, the Act's one-year limitations period begins to run on the date the ninety-day period defined by Supreme Court Rule 13 expires. See id.

In the instant case, direct review concluded on February 26, 1997, the date the California Supreme Court denied Landi's petition for review. Petitioner did not apply for certiorari. Adding ninety days under Supreme Court Rule 13, Petitioner had until

May 27, 1997 to file his federal petition.

2. Statutory Tolling

The running of the limitation period is tolled under § 2244(d)(2) for the time period during which a properly filed application for post-conviction or other collateral review is pending in State court. See Dictado v. Ducharme, 189 F.3d 889, 891 (9th Cir. 1999). An application for collateral review is "pending" in state court for "'all of the time during which a state prisoner is attempting, through proper use of state court procedures, to exhaust state court remedies with regard to a particular post-conviction application.'" Nino v. Galaza, 183 F.3d 1003, 1006 (9th Cir. 1999) (quoting Barnett v. Lemaster, 167 F.3d 1321, 1323 (10th Cir. 1999)). In California, this means that the statute of limitations is tolled from the time the first state habeas petition is filed until the California Supreme Court rejects the petitioner's final collateral challenge. See id.

Petitioner is entitled to tolling for the entire time he pursued his post-conviction remedies in State court, from February 25, 1998 until March 31, 1999. This results in 399 days of tolling. Applying this period to the May 27, 1997 filing deadline, Petitioner's federal habeas petition would have had to have been filed on or before June 29, 1999. The instant petition, filed in this Court September 21,

1999, was not timely.[1]

3. Equitable Tolling

The one-year limitation period can be equitably tolled because the statute of limitations is not a jurisdictional bar. See Calderon v. United States District Court (Beeler), 128 F.3d 1283, 1288 (9th Cir. 1997) cert. denied, 523 U.S. 1, and cert. denied, 523 U.S. 1061 (1998), overruled in part on other grounds by Calderon v. United States District Court (Kelly), 163 F.3d 530 (9th Cir. 1998) (en banc), cert. denied, 119 S.Ct. 1377 (1999). Equitable tolling is available, however, only upon a showing of extraordinary circumstances beyond Petitioner's control. See id. "When external forces, rather than a petitioner's lack of diligence, account for the failure to file a timely claim, equitable tolling of the statute of limitations may be appropriate." Miles v. Prunty, 187 F.3d 1104, 1107 (9th Cir. 1999). Equitable tolling is rare; so far, the Ninth Circuit has only found it to apply three times. See id. (equitable tolling applies when prison authorities fail to follow prisoner's request to draw filing fee for habeas petition from his trust account and mail it with

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[1] Although Petitioner does not make the argument, an application of the Houston v. Lack, 487 U.S. 266, 276 (1988) "mailbox rule" does not change the result. The earliest date Petitioner could have delivered his petition to prison authorities for forwarding to the Court was September 1, 1999, the date Petitioner signed his pleadings.

petition to district court for filing); Kelly, 163 F.3d at 541-42 (prison entitled to equitable tolling due to earlier court-ordered stay of habeas proceedings, alleged mental incompetency, and existence of timely habeas proceedings pending at one time that were mistakenly dismissed), and Beeler, 128 F.3d at 1289 (withdrawal of attorney who was aiding capital habeas petitioner to prepare petition and whose work product was not usable by replacement attorney qualified as extraordinary circumstances which justified tolling statute of limitations); cf. Whalem/Hunt v. Early, 204 F.3d 907, 909-10 (9th Cir. 2000) (equitable tolling not allowed for delay in availability of AEDPA materials for petition where petitioner claimed that his lack of awareness of the time limitation prevented him from filing sooner).

Petitioner alleges that his failure to file a timely petition should be excused, and the statute of limitations equitably tolled, because the attorney he retained to pursue his State post-conviction relief allowed the statute of limitations to lapse and did not inform him of the deadline. Landi also argues that he was deprived of sufficient access to the prison law library due to his work schedule and periods of lockdown.

Landi has not shown that the delay attendant to the filing of his federal habeas petition arose from circumstances beyond his control. First, the argument that Landi's retained counsel somehow allowed the statute of limitations to run is simply not supported by any evidence. Petitioner's exhibits show that counsel was aware of the AEDPA's one-year

statute of limitations and filed Landi's first State habeas corpus petition within a year after the direct appeal was final. Counsel correctly advised Landi that the federal statute of limitations would be tolled for the entire time he pursued post-conviction relief in State court. Counsel filed proper habeas corpus actions that did in fact toll the limitations period for the entire time they were pending in State Court. Nothing about counsel's representation of Landi adversely impacted the running of the statute of limitations.

While Landi wrote his attorney on several occasions to learn about the statute of limitations and ensure that no deadlines were missed, nothing in these letters, or in Landi's traverse, explains why he waited nearly six months after the supreme court denied his habeas corpus action to file his federal petition. This period of delay is the crux of Landi's current dilemma. After the California Supreme Court denied habeas relief, Landi had more than 90 days to apply for a federal writ.

To the extent that Landi contends his attorney failed to inform him of the impending deadline, lack of knowledge simply is not a basis for equitable tolling. See Whalem/Hunt, 204 F.3d. at 909-10 (equitable tolling not required by lack of awareness of AEDPA deadline). Perhaps, as Landi indicates, he relied to his detriment on misinformation from a self-avowed "jailhouse" lawyer. See Docket No. 16 at 4-5. This, however, is not an extraordinary circumstance meriting that the one-year limitation period be equitably tolled. Cf. Tacho v. Martinez, 862

F.2d 1376, 1381 (9th Cir. 1988) (mental condition of pro se petitioner and reliance upon allegedly incompetent jailhouse lawyers did not constitute "cause"). Moreover, the fact that Petitioner lacked legal counsel cannot toll the statute, since there is no right to counsel in habeas proceedings. See Turner v. Johnson, 177 F.3d 390, 392 (5th Cir.) (neither a prisoner's unfamiliarity with the legal process nor the lack of representation during the filing period excused the missed deadline under Section 2244(d)(1)), cert. denied, 120 S.Ct. 504 (1999).

While Landi asserts that he was denied access to the law library, he has not demonstrated that any library closures rendered him unable to pursue his legal remedies for the entire statutory period. See United States v. Van Poyck, 980 F.Supp. 1108, 1109 (C.D. Cal. 1997) (no tolling for prisoner who failed to show brief intermittent lockdowns prevented him from filing his petition). Congress gave prisoners one year to get to federal court. This one year leaves room for unpredictable lockdowns, as well as interruptions in research and writing time. That is not to say that a lockdown or library closure will never constitute an extraordinary circumstance warranting tolling. For example, a prisoner who can point to a specific time period (especially very near the deadline) when he was unable to work on his petition might have the period tolled for a limited amount of time. Landi has not made any showing, however, that his ability to file his petition was actually impacted by such events. Moreover, the Court notes that all of the issues presented in the

federal petition had been briefed and prepared by counsel for presentation in State Court, decreasing the necessary amount of law library access. See Whalem/Hunt, 204 F.3d at 909-10 (inadequacy of prison law library not ground to trigger later filing date or sufficient to constitute equitable tolling where Petitioner alleged same constitutional grounds for relief in State court petition).

Accordingly, the Court finds that this case it not one presenting extraordinary circumstances to warrant any period of equitable tolling.

CONCLUSION

The petition for a writ of habeas corpus is DISMISSED. All pending motions are TERMINATED. Petitioner's motion to reconsider the appointment of counsel (Docket Nos. 17, 18) is DENIED as moot. The Clerk shall close the file.

IT IS SO ORDERED.

DATED: 5-1-00

SAUNDRA BROWN ARMSTRONG
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

MICHAEL J. LANDI

Petitioner,

v.

R. Q. HICKMAN,

Respondent.

/

No. C 99-04301 SBA

ORDER

This matter comes before the Court on petitioner's Motion for Reconsideration of the Order Dismissing the Petition as Time-Barred. [#33-1]. Having read and considered the papers submitted by the parties and being fully informed, the Court hereby DENIES petitioner's Motion for Reconsideration.

BACKGROUND

In a judgment filed May 3, 2000, this Court dismissed with prejudice petitioner's action. On that same day, the Court filed its Order Granting Respondent's Motion to Dismiss. Factoring in statutory tolling permitted under 28 U.S.C. § 2244(d)(2), the Court determined that the limitations

period for petitioner to file a habeas petition ended on May 27, 1999. Petitioner filed the instant petition on September 21, 1999. Accordingly, the Court concluded the petition was untimely. The Court further determined that petitioner's case did not present any extraordinary circumstances warranting equitable tolling. On the basis of those findings, the Court dismissed petitioner's writ of habeas corpus.

Petitioner now moves for reconsideration of the Court's order dismissing his writ. He presents new grounds for equitable tolling, asserts that 28 U.S.C. § 2244 violates due process of law, and claims that § 2244 violates Article I , Section 9, Clause 2 of the United States Constitution.

DISCUSSION[1]

A. Equitable Tolling.

Plaintiff filed his federal petition almost four months past the filing date. He maintains equitable tolling applies because (1) his retained counsel delayed 85 days in filing his *state* habeas corpus petition, (2) his retained counsel delayed 102 days in returning transcripts to the petitioner, and (3) the prison delayed 25 days in photocopying his federal petition.

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[1] The Court draws portions of this discussion section from the respondent's proposed order.

Equitable tolling is available only "if 'extraordinary circumstances' beyond a petitioner's control make it impossible to file a petition on time." Calderon v. United States District Court (Beeler), 128 F.3d 1283, 1288 (9th Cir. 1997) overruled in part on other grounds by Calderon v. United States District Court (Kelly), 163 F.3d 530 (9th Cir. 1998) (en banc.), cert. denied, 119 S.Ct. 1377 (1999). The United States Constitution does not provide a constitutional right to effective assistance of counsel in habeas corpus cases. Bonin v. Calderon, 77 F.3d 1155, 1159 (9th Cir. 1996). A lawyer's mistake normally does not provide a valid basis for equitable tolling. Taliani v. Chrans, 189 F.3d 597, 598 (7th Cir. 1999) (counsel's miscalculation of limitations period did not toll the statute of limitations); Sandvik v. United States, 177 F.3d 1269, 1272 (11th Cir. 1999) (counsel's failure to mail petition with sufficient lead time to ensure timely filing was not an extraordinary circumstance warranting equitable tolling). Here, counsel's delay in filing the state habeas petition is not an extraordinary circumstance beyond petitioner's control.

The petitioner's second basis for tolling also is unavailing. As the Court noted in its Order Granting Defendant's Motion to Dismiss, "all of the issues presented in the federal petition had been briefed and prepared by counsel for presentation in State court." (Order at 5). In light of this fact, it is not apparent why the state transcripts were needed for the preparation of the instant petition, especially given the absence of any explanation by petitioner.

See United States v. Van Povck, 980 F.Supp. 1108, 1111 (C.D. Cal. 1997) (finding it could not conclude the absence of transcripts was an extraordinary circumstance in light of defendant's failure to explain why the transcripts were necessary for the preparation of his § 2255 motion). Petitioner has not alleged that he is entitled to these transcripts when preparing a motion under § 2244. See Fadaviro v. United States, 30 F.Supp.2d 772, 780 (D.N.J. 1998) (finding that delay in obtaining transcript is not extraordinary in part because petitioner bringing a § 2255 motion does not have an automatic right to free transcripts).

Although petitioner's third claim very well may provide a viable basis for equitable tolling, see Houston v. Lack, 487 U.S. 266 (1988), the 25-day delay associated with it commenced after the limitations period had expired. No equitable tolling could apply at that juncture in time.

Petitioner has not demonstrated that he is entitled to equitable tolling. The Court's initial finding to that effect is correct.

B. Due Process

Petitioner contends § 2244 is fundamentally unfair: "[T]here is something fundamentally unfair with a system that requires inmates sentenced to life imprisonment to represent themselves against the experienced and well educated prosecutor." Petitioner claims § 2244 is fundamentally unfair specifically because it forces an inmate to represent

himself even if he lacks any training in the law and imposes a strict one-year time limit. In order to accommodate his due process concerns, petitioner proposes a rule requiring the state to demonstrate prejudice before the court can dismiss a petition as untimely.

The constitution does not reflect petitioner's concern with the fairness of individuals not versed in the law proceeding pro se in a habeas action. It does not provide a right to counsel on habeas corpus, Bonin, 77 F.3d at 1159, nor does it excuse a habeas petitioner based on his pro se status or lack of education from procedural obligations, see Hughes v. Idaho Bd. of Corrections, 800 F.2d 905, 909 (9th Cir. 1986); Miller v. Marr, 141 F.3d 976, 978 (10th Cir. 1998); Fisher v. Johnson, 174 F.3d 710, 714 (5th Cir. 1999). Existing case law does not support a requirement that a defendant show prejudice from a petitioner's untimely filing nor does it suggest the one-year limitation period is unfair. See generally Calderon, 128 F.3d at 1287-8.

C. Suspension Clause

Petitioner contends that § 2244 violates the Suspension Clause, which provides that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion of public Safety may require it." U.S. CONST. art. I, § 9, cl. 2. The statute of limitations violates the Suspension Clause only if it "renders the habeas remedy 'inadequate or ineffective' to test the legality

of detention." See Miller, 141 F.3d at 977 (quoting Swain v. Pressley, 430 U.S. 372, 381 (1977) and United States v. Hayman, 342 U.S. 205, 223 (1952)). The petitioner has the burden of showing that the remedy is inadequate or ineffective. See id.; see also Redfield v. United States, 315 F.2d 76, 83 (9th Cir. 1963).

Per se objections on Suspension Clause grounds to § 2244(d) have proven unsuccessful. See e.g. Lucidore v. New York State Division of Parole, 209 F.3d 107, 113 (2d Cir. April 6, 2000); Molo v. Johnson, 207 F.3d 773, 775 (5th Cir. March 28, 2000); Turner v. Johnson, 177 F.3d 390 (5th Cir. 1999); Ciria v. Cambra, 1998 WL 823026, *3 (N.D. Cal. 1998) (Jenkins, J.). Because the one-year statute of limitations "leaves habeas petitioners with some reasonable opportunity to have their claims heard on the merits," the habeas remedy is not thereby "inadequate or ineffective to test the legality of detention." Lucidore, 209 F.3d at 113 (internal citation and quotation omitted). Petitioner does not cite to any authority upholding a per se challenge to § 2244(d) on Suspension Clause Grounds nor does he show the limitation period here has rendered his habeas remedy inadequate or ineffective.

CONCLUSION

Petitioner's petition was untimely. He has not demonstrated any extraordinary circumstance warranting equitable tolling of his claim. Under the circumstances of this case, the United States Constitution imposes no impediment to the

application of the one-year statute of limitations. Accordingly, defendant's Motion is DENIED.

IT IS SO ORDERED.

Dated: September 26, 2000

SAUNDRA BROWN ARMSTRONG
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

MICHAEL JERRY LANDI, Petitioner, v. R.Q. HICKMAN, Warden, Respondent.	No. C 99-4301 SBA ORDER GRANTING CERTIFICATE OF APPEALABILITY

BACKGROUND

Petitioner Michael J. Landi filed a petition for a writ of habeas corpus in this Court on September 21, 1999. On May 3, 2000, the Court dismissed the petition as untimely and entered judgment in favor of Respondent. Petitioner filed a motion for reconsideration on May 12, 2000, and a Notice of Appeal on May 30, 2000. The Court granted Petitioner repeated extensions of time to file documentary support for his motion for reconsideration, and granted leave to file a substitute motion for reconsideration on August 21, 2000. On September 27, 2000, the Court denied the motion. Petitioner filed a Notice of Appeal on October 20, 2000, and a

Request for a Certificate of Appealability on February 23, 2001. The Court now grants Petitioner a certificate of appealability as to his entire petition and certifies that his appeal is taken in good faith.

DISCUSSION

I. Legal Standard

Unless a circuit justice or judge issues a certificate of appealability ("COA"), an appeal may not be taken to the court of appeals from the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a state court. See 28 U.S.C. § 2253(c)(1)(A). Section 2253(c)(1) applies to an appeal of a final order entered on a procedural question antecedent to the merits, for instance a dismissal on statute of limitations grounds. See Slack v. McDaniel, 529 U.S. 473, 483 (2000). When a petitioner files a notice of appeal from an order dismissing or denying a petition, the district court judge who rendered the judgment must either issue a certificate of appealability or state why a certificate should be not issue. See Fed. R. App. P. 22(b)(1); United States v. Asrar, 116 F.3d 1268, 1270 (9th Cir. 1997).

"Determining whether a COA should issue where the petition was dismissed on procedural grounds has two components, one directed at the underlying constitutional claims and one directed at the district court's procedural holding." Slack, 529 U.S. at 484-85. "When the district court denies a

habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." Id. at 484; see James v. Giles, 221 F.3d 1074, 1077 (9th Cir. 2000). As each of these components is a "threshold inquiry," the federal court "may find that it can dispose of the application in a fair and prompt manner if it proceeds first to resolve the issue whose answer is more apparent from the record and arguments." Slack, 529 U.S. at 485. Supreme Court jurisprudence "allows and encourages" federal courts to first resolve the procedural issue. See id.

As to the "denial of a constitutional right" prong of the Slack test, the court simply takes a "quick look" at the face of the complaint, taking the factual allegations are true, and determines if petitioner has "facially allege[d] the denial of a constitutional right." Lambright v. Stewart, 220 F.3d 1022, 1026-27 (9th Cir. 2000) (internal quotation marks omitted). All of the inferences that apply to ruling on a Rule 12(b)(6) motion apply to this situation. See id. If the petitioner has facially alleged the denial of a constitutional right and the procedural ruling is debatable, a COA should be granted. See id.

II Procedural Grounds for Dismissal

The Court concludes that jurists of reason would find it debatable whether Petitioner's petition was untimely. In its Order Granting Motion to Dismiss, the Court rejected Petitioner's argument that the AEDPA limitations period must be equitably tolled during a period when he was deprived of sufficient access to the prison law library due to his work schedule and periods of lockdown. The Court relied in part on the panel decision in Whalem/Hunt v. Early, 204 F.3d 907 (9th Cir. 2000), which has since been reheard en banc and reversed, see Whalem/Hunt v. Early, 233 F.3d 1146 (9th Cir. 2000). The panel had rejected an equitable tolling argument that was based on the absence of AEDPA materials in the prison law library. "The fact that Whalem/Hunt alleges the same basis for habeas relief in federal court as he did in state court demonstrates that he was able to formulate and present his constitutional claims despite the prison officials' alleged failure to provide the AEDPA materials for review." Whalem/Hunt, 204 F.3d at 909. The en banc court held, however: "We do not agree ... that there are no circumstances consistent with petitioner's petition and declaration under which he would be entitled ... to equitable tolling." Whalem/Hunt, 233 F.3d at 1148. The court remanded the case to the district court "for appropriate development of the record." Id. Three concurring judges opined that denial of access to library materials might justify equitable tolling if the petitioner were unable to research or identify his

claims, or if he were unable to discover the "basic procedural rules essential to avoid being summarily thrown out of court." Id. (Tashima, J., concurring).

In light of the en banc decision in Whalem/Hunt, the Court concludes that jurists of reason could differ on whether Petitioner was entitled to the benefits of equitable tolling, or at least whether the Court correctly rejected the equitable tolling argument without requiring further development of the factual record. The Court also concludes that jurists of reason might differ on whether the limitations period should be equitably tolled during the three-month period when his former attorney failed to provide Petitioner with his case file, which he allegedly needed to prepare his federal petition.

Therefore, Petitioner has satisfied the first prong of the test for obtaining a certificate of appealability.

III Substantial Showing of the Denial of a Constitutional Right

Petitioner has facially alleged the denial of constitutional rights in all of the claims asserted in his petition. He asserts four ineffective assistance of counsel claims, based on his trial attorney's failure to properly advise him regarding his guilty plea and failure to present mitigating evidence at his sentencing hearing. These claims allege violations of his Sixth Amendment right to competent counsel. Petitioner also alleges a Due Process violation related

to the court's consideration of a mental health report at the time of his sentencing. Finally, he alleges that he was coerced into pleading guilty, a violation of his Due Process rights, because prosecutors threatened to use his prior convictions against him at trial, based on a state law that went into effect after Petitioner allegedly committed the crimes to which he pled guilty. Petitioner argues that application of the new state law in his case would have been a violation of the Ex Post Facto clause; therefore, threatening to do so in order to induce a guilty plea was unconstitutional.

Because petitioner facially alleges that his constitutional rights were violated, he has satisfied the second prong of the test for issuing a certificate of appealability.

CONCLUSION

For the foregoing reasons, the Court grants a certificate of appealability as to Petitioner's entire petition. (Docket #39) The Court also certifies that Petitioner's appeal is taken in good faith. See U.S.C. § 1915(a)(3). (Docket #37)

IT IS SO ORDERED.

DATED: 4/10/01

SAUNDRA BROWN ARMSTRONG
United States District Judge

This case was not selected for publication in the Federal Reporter

Michael Jerry LANDI, Petitioner-Appellant,

v.

R.Q. HICKMAN, Warden, Respondent-Appellee.

No. 01-15730
D.C. No. CV-99-04301.

United States Court of Appeals, Ninth Circuit

Submitted March 11, 2002.*
Decided March 20, 2002.

Appeal from the United States District Court for the Northern District of California, Saundra B. Armstrong, District Judge, Presiding.

Before FARRIS W. FLETCHER, and FISHER, Circuit Judges

* The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R.App.P. 34(a)(2).

MEMORANDUM**

Michael Jerry Landi appeals pro se the district court's dismissal as untimely of his 28 U.S.C. § 2254 habeas petition challenging his guilty plea conviction for three counts of lewd conduct with a child by means of force in violation of Cal. Penal Code § 288(b), with enhancements for prior convictions and kidnapping. We have jurisdiction pursuant to 28 U.S.C. § 2253. Since the relevant facts are not in dispute, we review de novo the issue of equitable tolling, *Miles v. Prunty*, 187 F.3d 1104, 1105 (9th Cir. 1999), and we affirm.

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** This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by 9th Cir. R. 36-3.

Landi contends he is entitled to equitable tolling of the Antiterrorism and Effective Death Penalty Act (AEDPA) limitations period because his attorney delayed returning his case file and transcripts, severely impeding his ability to timely file his federal habeas petition.[1] Landi abandons his denial of access to the prison law library claim on appeal.[2]

Equitable tolling of AEDPA is appropriate only where extraordinary circumstances beyond a prisoner's control render it impossible to timely file a petition. *Calderon v. United States District Court (Beller)*, 128 F.3d 1283, 1288 (9th Cir. 1997), *overruled on other grounds by Calderon v. United States District Court (Kelly)*, 163 F.3d 530 (9th Cir. 1998) (en banc). Landi's assertion of attorney negligence does

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[1] Landi also raises a First Amendment violation based on his perceived inability to keep the materials himself. Because the district court did not grant a certificate of appealability on these issues, and Landi has not sought an expansion of the certificate of appealability, we decline to review it on appeal. *United States v. Kramer*, 195 F.3d 1129, 1131 (9th Cir. 1999).

[2] The district court granted a certificate of appealability on denial of law library access, but Landi maintains on appeal that he "has never claimed lack of law library access as a direct reason" for his untimely filing, and presents no argument supporting limited law library access. A bald assertion of lack of access to library materials does not automatically qualify as grounds for equitable tolling. *Whalem/Hunt v. Early*, 233 F.3d 1146, 1148 (9th Cir. 2000) (en banc).

not rise to the level of the "extraordinary circumstances" necessary for equitable tolling. *See Frye v. Hickman*, 273 F.3d 1144, 1146 (9th Cir. 2001) (stating neither miscalculation of the limitations period by defense counsel nor negligence in general constitute extraordinary circumstances sufficient to warrant equitable tolling).

AFFIRMED.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MICHAEL JERRY LANDI,	
	No. 01-15730
Petitioner-Appellant,	
	D.C. No. CV-99-04301 SBA
v.	Northern Calif. (Oakland)
R.Q. HICKMAN, Warden,	
	ORDER
Respondent-/Appellee.	

Before: FARRIS, W. FLETCHER and FISHER, Circuit Judges

Appellant's petition for rehearing and suggestion for rehearing en banc to Fed. R. App. P. 40 is DENIED. No further filings shall be accepted in this closed appeal.